

TRACKING DECISION 1015

1. At its 24th Extraordinary Session, held 30 July – 8 August 2018, the African Commission, following up on decision 1015 by the AU Executive Council, “took the following measures to give effect to some of the recommendations that were made to the Commission:
 - i. Adoption of a decision on the withdrawal of the Observer Status granted to the NGO Coalition of African Lesbians (CAL), with a letter of notification addressed to CAL;
 - ii. Establishment of a Committee comprised of three Commissioners to conduct research on all relevant aspects that can be useful in developing a Code of Conduct for Commissioners;
 - iii. Establishment of a Committee comprised of three Commissioners to prepare a document on the interpretative mandate of the Commission.”¹
2. In August 2018, the African Commission sent a letter to CAL, withdrawing its Observer Status. In September 2018, a group of civil society organizations together with CAL issued a joint statement criticizing the decision by the AU Executive Council, and calling the ACHPR to resist interference by AU policy organs, upholding its independence. The joint statement also called on States “to speak out and counter the anti-human rights propaganda and the dismantling of the African human rights system.”
3. In October 2018, several organisations came together to join efforts for interventions against the threats faced by the ACHPR. On Tuesday 23rd October 2018 there was a strategy meeting with NGOs attending the NGO Forum in Banjul, The Gambia. At this side event, dubbed ‘Defending the Independence of the African Commission on Human and People’s Rights (ACHPR) Strategy Meeting,’ organisations presented on the different sub-regional interventions they had undertaken towards this discourse. This meeting resulted to a joint statement against the threats to the African Human Rights System and more specifically to the African Court and the hosting of the 2019 64th extraordinary session in Egypt.
4. During its 63rd Period of Sessions, held from 24 October to 13 November 2018 in Banjul, the ACHPR issued Resolution 402 on the interpretative and protective mandates of the ACHPR (ACHPR/Res. 402 (LXIII) 2018).² In this resolution, the African Commission reaffirmed the meaning and relevance of the mandates of the Commission conferred by the African Charter. This resolution reads as follows:

¹ http://www.achpr.org/files/sessions/24th-eos/info/communiqu-24eos/final_communicu_24eos_eng.pdf.

² ACHPR, **402: Resolution on the interpretative and protective mandates of the African Commission on Human and Peoples’ Rights - ACHPR/Res. 402 (LXIII) 2018, Done at the 63rd Ordinary Session of the African Commission on Human and Peoples’ Rights, held from 24 October to 13 November 2018 in Banjul, The Gambia**
http://www.achpr.org/sessions/63rd_os/resolutions/402/



Recalling the Commission's functions under Article 45 of the African Charter on Human and Peoples' Rights ('African Charter' or 'Charter'), which provides for the protection, promotion and interpretive mandates of the Commission;

Recalling the commitments of all State Parties to ensure the rights and freedoms guaranteed in the African Charter, and noting the central role that the Commission, established under Article 30 of the African Charter, plays in ensuring respect for and the full enjoyment and protection of human and peoples' rights;

Conscious that the Assembly of Heads of State and Government showed their commitments to human and peoples' rights by declaring 2017-2027 as the African Human Rights Decade;

Recalling that Article 2 of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights (the Court Protocol) establishes the relationship between the African Commission and the African Court on Human and Peoples' Rights (the Court) by providing that the Court shall complement the protective mandate of the Commission;

Further recalling the harmonization of the 2010 Rules of Procedure of the Commission and Rules of Court to give effect to this complementarity;

Confirming that Article 4 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) reiterates the complementarity of the Court to the protective mandate of the Commission;

Additionally recalling that the promotion and protection mandates of the Commission involve interpretation of the provisions of the African Charter, including through the formulation of principles and rules for solving legal problems relating to human and peoples' rights;

Underscoring that the protection mandate of the Commission is contentious as well as non-contentious, and that it includes a Communications procedure as well as urgent intervention mechanisms for responding on an on-going basis to emerging human rights complaints and situations through Urgent Appeals, resolutions and fact-finding missions;

Bearing in mind that the Commission's contentious protective mandate, which involves the submission and consideration of Communications, provides access to justice for citizens of all the 54 State Parties to the Charter, and that no other African institution provides such continent-wide access to justice;

Welcoming the ongoing internal reforms process of the African Union (Union) which aims to enhance the overall efficiency of the Union and its Organs;

Remaining deeply concerned by Executive Council decision DOC.EX.CL/1089(XXXIII) on the Report on the Joint Retreat of the Permanent Representatives' Committee and the African Commission, which requests State Parties to conduct an analytical review of the interpretative mandate of the Commission in the light of a similar mandate exercised by the African Court and the potential for conflicting jurisprudence;

Convinced that the on-going reforms process of the Union and any decisions of the Union's Policy Organs can strengthen the protective and interpretive functions of the Commission, as well as the overall human rights and governance framework on the continent;

The Commission:

1. **Reminds** State Parties of their cardinal obligation under the African Charter to give effect to the rights, freedoms and duties enshrined in the African Charter;
2. **Reiterates** that its interpretive mandate is inherent in its promotion and protection mandates as set out by the Charter;
3. **Further reiterates** that the protective mandate of the Commission applies universally across the continent and that it is contentious as well as non-contentious;
4. **Calls on** State Parties and the Union's Policy Organs to continue supporting the complimentary relationship between the African Commission and the African Court envisaged by the Court's Protocol and the Malabo Protocol, to ensure full access to justice for Africans;
5. **Calls on** State Parties to respect the normative standards and institutional frameworks established by the Charter, including by supporting the Commission which was established to promote, protect and interpret the rights in the Charter;
6. **Calls on** State Parties and Policy Organs of the Union to ensure that the on-going reforms process of the Union preserves and enhances the independent, distinct and specialized mandates of each Organ, while creating frameworks for improving their collaboration and effectiveness, to strengthen the overall human rights and governance framework on the continent; and
7. **Resolves** to continue engagements with all State Parties and the Union's Policy Organs in support of its protective and interpretive mandates.

5. During that same period of sessions, the African Commission also made observations on the following documents: proposals on the operationalisation of the recommendation on Code of Conduct of the Commission; and correspondence from the Coalition of African Lesbians (CAL) on the request for the legal basis of the withdrawal of its observer status, among others.³

6. Civil society organizations were concerned in November 2018, because of a draft resolution attempting to strip the African Commission of its protective mandate, and give the African Court an exclusive protection mandate, provided that all AU Member States ratified the Protocol Establishing the African Court (Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights), and accept the Court's competence under Article 34(6), allowing individuals and NGOs direct access to the Court.⁴

7. However, during the AU Extraordinary Summit in November 2018, the African Court was categorical that it did not support the proposal of affording it with an exclusive protective mandate.⁵ Unfortunately, the African Commission Chairperson did not attend this meeting. Following the presentation of the President of the African Court during this meeting, the following relevant observations were made: (i) The complementarity between the Court and the African Commission on Human and Peoples' Rights (ACHPR) makes no mention of "exclusive protective mandate" for the benefit of the Court; (ii) The relationship between the Court and the ACHPR needs to be clarified to avoid confusion between their respective mandates; ... (viii) The question of protection is a matter of the sovereignty of Member States...". The PRC concluded the following:
 - (i) The Court should define the profile of the NGOs it is dealing with, for the information of Member States;
 - (ii) The Court should draw a line between its prerogatives and those of the African Commission on Human and Peoples' Rights (ACHPR);
 - (iii) Member States are encouraged to comply with the judgments of the Court, although international courts have no binding legal powers;
 - (iv) The 1998 Court Protocol should be reopened to identify and address the reasons of the low level of ratification;

³ ACHPR, Final Communiqué of the 63rd Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia. 24 October to 13 November 2018, available at:

http://www.achpr.org/files/sessions/63rd_os/info/communiqu63/63rd_os_final_communique_eng.pdf.

⁴ PROJET DE DÉCISION SUR LA RÉFORME DES INSTITUTIONS JUDICIAIRES DE L'UNION AFRICAINE (RENFORCEMENT DU SYSTÈME DE PROTECTION DES DROITS DE L'HOMME). Ext/Assembly/2(XI)Addendum Page 13.

⁵ "The President of the Court intervened on a single point, i.e. "exclusive protective mandate" to indicate that it was a mistake because there is complementarity between the Court and the ACHPR. The word 'exclusive' will be deleted from the Report." See AU, Meeting of the Permanent Representatives' Committee, 11th Extraordinary Session of the Assembly, 5-6 November 2018. Addis Ababa, Ethiopia. Ext/PRC/Draft/Rpt(XI), para. 72.



- (v) There is further work to be done and this should include all the judicial organs. This issue will therefore be looked at the February 2019 Summit.⁶
8. The issue was not considered during the February 2019 AU Summit.
9. The ACHPR recently launched a consultation for review of the Rules of Procedures and the submissions closed on 27th September 2019.
10. The 2020 Rules of Procedure⁷ (2020 RoPs) were adopted at the African Commission's 27th Extra-Ordinary Session, held from 19 February to 04 March 2020, pursuant to Article 42(2) of the African Charter on Human and Peoples' Rights, and came into force on 02 June, 2020, in terms of Rule 145 thereof. Amongst the changes introduced is in Rule 3 that provides clarity on the status and mandate of the Commission in order to give full effect to Article 45 of the African Charter. This rule reiterates the autonomous nature of the Commission and its various competencies to interpret the African Charter and its own decisions and to ensure the operation of its Secretariat. Extract of Rule 3 of the 2020 RoPs:

Rule 3 Mandate and Status

1. In accordance with Articles 30 and 45 of the African Charter, the African Commission is an autonomous treaty organ with the mandate of promoting human and peoples' rights and ensuring the protection of human and peoples' rights in Africa.
2. In accordance with AU Assembly/AU/Dec.200 (XI), the African Commission is an Organ of the African Union.
3. In pursuing its mission, the Commission shall be competent to interpret the African Charter, including in response to a request for an advisory opinion pursuant to Article 45(3) of the Charter.
4. The Commission shall be competent to interpret its own decisions.
5. The Commission shall lay down its Rules of Procedure pursuant to Article 42 (2) of the Charter.
6. The Commission shall have the competence to ensure the efficient and technical organization and operation of the Secretariat.
7. The Commission shall perform any other tasks which the Assembly may entrust to it pursuant to Article 45(4) of the Charter.

⁶ AU, Meeting of the Permanent Representatives' Committee, 11th Extraordinary Session of the Assembly, 5-6 November 2018. Addis Ababa, Ethiopia. Ext/PRC/Draft/Rpt(XI), para. 73.

⁷ Press Release on Publication of New Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020 available at <https://www.achpr.org/pressrelease/detail?id=518>



VI. CONCLUSIONS

A collective of civil society organisations convened and developed a strategy for engaging various actors. The strategy includes developing a briefing paper, mapping faces and spaces for engagement, stakeholders' engagement, media and communication campaign and engaging friendly and non-friendly states.

The strategy lists stakeholders who could make change and spaces to engage to preserve the human rights accountability mechanisms in Africa, namely the African Commission on Human and Peoples' Rights.